

## § 350.6

parties to the proceeding and the position of the other parties on the motion.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53327, Sept. 11, 2006]

### § 350.6 Construction and waiver.

The regulations of the Copyright Royalty Judges are intended to provide efficient and just administrative proceedings and will be construed to advance these purposes. For purposes of an individual proceeding, the provisions of this subchapter may be suspended or waived, in whole or in part, upon a showing of good cause, to the extent allowable by law.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53327, Sept. 11, 2006]

## PART 351—PROCEEDINGS

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AUTHORITY: 17 U.S.C. 803.

SOURCE: 70 FR 30905, May 31, 2005, unless otherwise noted.

### § 351.1 Initiation of proceedings.

(a) *Notice of commencement; solicitation of petitions to participate.* All proceedings before the Copyright Royalty Judges to make determinations and adjustments of reasonable terms and rates of royalty payments, and to authorize the distribution of royalty fees, shall be initiated by publication in the FEDERAL REGISTER of a notice of the initiation of proceedings calling for the filing of petitions to participate in the proceeding.

(b) *Petitions to participate*—(1) *Royalty rate proceedings*—(i) *Single petition.* Each petition to participate filed in a royalty rate proceeding must include:

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(A) The petitioner's full name, address, telephone number, facsimile number (if any), and e-mail address (if any); and

(B) A description of the petitioner's significant interest in the subject matter of the proceeding.

(ii) *Joint petition.* Petitioners with similar interests may, in lieu of filing individual petitions, file a single petition. Each joint petition must include:

(A) The full name, address, telephone number, facsimile number (if any), and e-mail address (if any) of the person filing the petition;

(B) A list identifying all participants to the joint petition;

(C) A description of the participants' significant interest in the subject matter of the proceeding; and

(D) If the joint petition is filed by counsel or a representative of one or more of the participants that are named in the joint petition, a statement from such counsel or representative certifying that, as of the date of submission of the joint petition, such counsel or representative has the authority and consent of the participants to represent them in the royalty rate proceeding.

(2) *Distribution proceedings*—(i) *Single petition.* Each petition to participate filed in a royalty distribution proceeding must include:

(A) The petitioner's full name, address, telephone number, facsimile number (if any), and e-mail address (if any);

(B) In a cable or satellite royalty distribution proceeding, identification of whether the petition covers a Phase I proceeding (the initial part of a distribution proceeding where royalties are divided among the categories or groups of copyright owners), a Phase II proceeding (where the money allotted to each category is subdivided among the various copyright owners within that category), or both; and

(C) A description of the petitioner's significant interest in the subject matter of the proceeding.

(ii) *Joint petition.* Petitioners with similar interests may, in lieu of filing individual petitions, file a single petition. Each joint petition must include:

(A) The full name, address, telephone number, facsimile number (if any), and

e-mail address (if any) of the person filing the petition;

(B) A list identifying all participants to the joint petition;

(C) In a cable or satellite royalty distribution proceeding, identification of whether the petition covers a Phase I proceeding (the initial part of a distribution proceeding where royalties are divided among the categories or groups of copyright owners), a Phase II proceeding (where the money allotted to each category is subdivided among the various copyright owners within that category), or both;

(D) A description of the participants' significant interest in the subject matter of the proceeding; and

(E) If the joint petition is filed by counsel or a representative of one or more of the participants that are named in the joint petition, a statement from such counsel or representative certifying that, as of the date of submission of the joint petition, such counsel or representative has the authority and consent of the participants to represent them in the royalty distribution proceeding.

(3) *Filing deadline.* A petition to participate shall be filed by no later than 30 days after the publication of the notice of commencement of a proceeding, subject to the qualified exception set forth in paragraph (d) of this section.

(4) *Filing fee.* A petition to participate must be accompanied with a filing fee of \$150 or the petition will be rejected. Payment shall be made to the Copyright Royalty Board. If a check is subsequently dishonored, the petition will be rejected. If the petitioner believes that the contested amount of that petitioner's claim will be \$10,000 or less, petitioner shall so state in the petition to participate and should not include payment of the \$150 filing fee. If it becomes apparent during the course of the proceedings that the contested amount of the claim is more than \$10,000, the Copyright Royalty Judges will require payment of the filing fee at such time.

(c) *Acceptance and rejection of petitions to participate.* A petition to participate will be deemed to have been allowed by the Copyright Royalty Judges unless the Copyright Royalty Judges determine the petitioner lacks a significant

interest in the proceeding or the petition is otherwise invalid.

(d) *Late petitions to participate.* The Copyright Royalty Judges may, for substantial good cause shown, and if there is no prejudice to the participants that have already filed petitions, accept late petitions to participate at any time up to the date that is 90 days before the date on which participants in the proceeding are to file their written direct statements. However, petitioners whose petitions are filed more than 30 days after publication of notice of commencement of a proceeding are not eligible to object to a settlement reached during the voluntary negotiation period.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53327, Sept. 11, 2006]

#### **§ 351.2 Voluntary negotiation period; settlement.**

(a) *Commencement; duration.* After the date for filing petitions to participate in a proceeding, the Copyright Royalty Judges will announce the beginning of a voluntary negotiation period and will make a list of the participants available to the participants in the particular proceeding. The voluntary negotiation period shall last three months, after which the parties shall notify the Copyright Royalty Judges in writing as to whether a settlement has been reached.

(b) *Settlement—(1) Distribution proceedings.* Pursuant to 17 U.S.C. 801(b)(7)(A), to the extent that a settlement has been reached in a distribution proceeding, that agreement will provide the basis for the distribution.

(2) *Royalty rate proceedings.* If, in a proceeding to determine statutory terms and rates, the participating parties report that a settlement has been reached by some or all of the parties, the Copyright Royalty Judges, pursuant to 17 U.S.C. 801(b)(7)(A), will publish the settlement in the FEDERAL REGISTER for notice and comment from those bound by the terms, rates, or other determination set by the agreement. If an objection to the adoption of an agreement is filed, the Copyright Royalty Judges may decline to adopt the agreement as a basis for statutory terms and rates for participants that are not parties to the agreement if the

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Copyright Royalty Judges conclude that the agreement does not provide a reasonable basis for setting statutory terms or rates.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53328, Sept. 11, 2006]

#### § 351.3 Controversy and further proceedings.

(a) *Declaration of controversy.* If a settlement has not been reached within the voluntary negotiation period, the Copyright Royalty Judges will issue an order declaring that further proceedings are necessary. The procedures set forth at §§ 351.5, *et seq.*, for formal hearings will apply, unless the abbreviated procedures set forth in paragraphs (b) and (c) of this section are invoked by the Copyright Royalty Judges.

(b) *Small claims in distribution proceedings*—(1) *General.* If, in a distribution proceeding, the contested amount of a claim is \$10,000 or less, the Copyright Royalty Judges shall decide the controversy on the basis of the filing of the written direct statement by each participant (or participant group filing a joint petition), the response by any opposing participant, and one optional reply by a participant who has filed a written direct statement.

(2) *Bad faith inflation of claim.* If the Copyright Royalty Judges determine that a participant asserts in bad faith an amount in controversy in excess of \$10,000 for the purpose of avoiding a determination under the procedure set forth in paragraph (b)(1) of this section, the Copyright Royalty Judges shall impose a fine on that participant in an amount not to exceed the difference between the actual amount distributed and the amount asserted by the participant.

(c) *Paper proceedings*—(1) *Standard.* The procedure under this paragraph (c) will be applied in cases in which there is no genuine issue of material fact, there is no need for evidentiary hearings, and all participants in the proceeding agree in writing to the procedure. In the absence of an agreement in writing among all participants, this procedure may be applied by the Copyright Royalty Judges either on the motion of a party or by the Copyright Royalty Judges *sua sponte*.

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(2) *Procedure.* Paper proceedings will be decided on the basis of the filing of the written direct statement by the participant (or participant group filing a joint petition), the response by any opposing participant, and one optional reply by a participant who has filed a written direct statement.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53328, Sept. 11, 2006]

#### § 351.4 Written direct statements.

(a) *Required filing; deadline.* All parties who have filed a petition to participate in the hearing must file a written direct statement. The deadline for the filing of the written direct statement will be specified by the Copyright Royalty Judges, not earlier than 4 months, nor later than 5 months, after the end of the voluntary negotiation period set forth in § 351.2.

(b) *Required content*—(1) *Testimony.* The written direct statement shall include all testimony, including each witness's background and qualifications, along with all the exhibits.

(2) *Designated past records and testimony.* Each participating party may designate a portion of past records, including records of the Copyright Royalty Tribunal or Copyright Arbitration Royalty Panels, that it wants included in its direct statement. If a party intends to rely on any part of the testimony of a witness in a prior proceeding, the complete testimony of that witness (*i.e.*, direct, cross and redirect examination) must be designated. The party submitting such past records and/or testimony shall include a copy with the written direct statement.

(3) *Claim.* In the case of a royalty distribution proceeding, each party must state in the written direct statement its percentage or dollar claim to the fund. In the case of a rate (or rates) proceeding, each party must state its requested rate. No party will be precluded from revising its claim or its requested rate at any time during the proceeding up to, and including, the filing of the proposed findings of fact and conclusions of law.

(c) *Amended written direct statements.* A participant in a proceeding may amend a written direct statement based on new information received during the discovery process, within 15

days after the end of the discovery period. An amended written direct statement must explain how it differs from the written direct statement it will amend and must demonstrate that the amendment is based on new information received during the discovery process. The participant amending its written direct statement may file either the amended portions of the written direct statement or submit complete new copies at its option.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53328, Sept. 11, 2006; 71 FR 59010, Oct. 6, 2006]

#### § 351.5 Discovery in royalty rate proceedings.

(a) *Schedule.* Following the submission to the Copyright Royalty Judges of written direct and rebuttal statements by the participants in a royalty rate proceeding, and after conferring with the participants, the Copyright Royalty Judges will issue a discovery schedule.

(b) *Document production, depositions and interrogatories*—(1) *Document production.* A participant in a royalty rate proceeding may request of an opposing participant nonprivileged documents that are directly related to the written direct statement or written rebuttal statement of that participant. Broad, nonspecific discovery requests are not acceptable. All documents offered in response to a discovery request must be furnished in as organized and useable form as possible. Any objection to a request for production shall be resolved by a motion or request to compel production. The motion must include a statement that the parties had conferred and were unable to resolve the matter.

(2) *Depositions and interrogatories.* In a proceeding to determine royalty rates, the participants entitled to receive royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Similarly, the participants obligated to pay royalties shall collectively be permitted to take no more than 10 depositions and secure responses to no more than 25 interrogatories. Parties may obtain such discovery regarding any matter, not privileged, that is relevant to the claim or

defense of any party. Relevant information need not be admissible at hearing if the discovery by means of depositions and interrogatories appears reasonably calculated to lead to the discovery of admissible evidence.

(c) *Motions to request other relevant information and materials.* (1) In any royalty rate proceeding scheduled to commence prior to January 1, 2011, a participant may, by means of written or oral motion on the record, request of an opposing participant or witness other relevant information and materials. The Copyright Royalty Judges will allow such request only if they determine that, absent the discovery sought, their ability to achieve a just resolution of the proceeding would be substantially impaired.

(2) In determining whether such discovery motions will be granted, the Copyright Royalty Judges may consider—

(i) Whether the burden or expense of producing the requested information or materials outweighs the likely benefit, taking into account the needs and resources of the participants, the importance of the issues at stake, and the probative value of the requested information or materials in resolving such issues;

(ii) Whether the requested information or materials would be unreasonably cumulative or duplicative, or are obtainable from another source that is more convenient, less burdensome, or less expensive; and

(iii) Whether the participant seeking the discovery had an ample opportunity by discovery in the proceeding or by other means to obtain the information sought.

[71 FR 53328, Sept. 11, 2006]

#### § 351.6 Discovery in distribution proceedings.

In distribution proceedings, the Copyright Royalty Judges shall designate a 45-day period beginning with the filing of written direct statements within which parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony. However, all

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parties shall be given a reasonable opportunity to conduct discovery on amended statements.

[71 FR 53328, Sept. 11, 2006]

#### § 351.7 Settlement conference.

A post-discovery settlement conference will be held among the participants, within 21 days after the close of discovery, outside of the presence of the Copyright Royalty Judges. Immediately after this conference the participants shall file with the Copyright Royalty Judges a written Joint Settlement Conference Report indicating the extent to which the participants have reached a settlement.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

#### § 351.8 Pre-hearing conference.

In the absence of a complete settlement in a proceeding not subject to the abbreviated procedures set forth in §§351.3(b) and (c), a hearing will be scheduled expeditiously so as to allow the Copyright Royalty Judges to conduct hearings and issue its final determination in the proceeding within the time allowed by the Copyright Act. Prior to the hearing, the Copyright Royalty Judges may conduct a pre-hearing conference to assist in setting the order of presentation of evidence and the appearance of witnesses at the hearing and to provide for the submission of pre-hearing written legal arguments.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

#### § 351.9 Conduct of hearings.

(a) *By panels.* Subject to paragraph (b) of this section, hearings will be conducted by Copyright Royalty Judges sitting *en banc*.

(b) *Role of Chief Judge.* The Chief Copyright Royalty Judge, or an individual Copyright Royalty Judge designated by the Chief Judge, may preside over such collateral and administrative proceedings, and over such proceedings under section 803(b)(1) through (5) of the Copyright Act, as the Chief Judge considers appropriate. The Chief Judge, or an individual Copyright Royalty Judge designated by the Chief

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Judge, shall have the responsibility for:

(1) Administering oaths and affirmations to all witnesses;

(2) Announcing the Copyright Royalty Judges' ruling on objections and motions and all rulings with respect to introducing or excluding documentary or other evidence. In all cases, with the exception of a hearing pursuant to 17 U.S.C. 803(a)(2), it takes a majority vote to grant a motion or sustain an objection. A tie vote will result in the denial of a motion or the overruling of the objection;

(c) *Opening statements.* In each distribution or rate proceeding, each party may present its opening statement summarizing its written direct statement.

(d) *Notice of witnesses and prior exchange of exhibits.* Each party must provide all other parties notice of the witnesses who are to be called to testify at least one week in advance of such testimony, unless modified by applicable trial order. Parties must exchange exhibits at least one day in advance of being offered into evidence at a hearing, unless modified by applicable trial order.

(e) *Subpoenas.* The parties may move the Copyright Royalty Judges to issue a subpoena. The object of the subpoena shall be served with the motion and may appear in response to the motion.

(f) *Witnesses sequestered.* Subject to applicable trial order, witnesses, other than party representatives, may not be permitted to listen to any testimony and may not be allowed to review a transcript of any prior testimony.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

#### § 351.10 Evidence.

(a) *Admissibility.* All evidence that is relevant and not unduly repetitious or privileged, shall be admissible. Hearsay may be admitted to the extent deemed appropriate by the Copyright Royalty Judges. Written testimony and exhibits must be authenticated or identified in order to be admissible as evidence. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the

matter in question is what its proponent claims. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to materials that can be self-authenticated under Rule 902 of the Federal Rules of Evidence such as certain public records. No evidence, including exhibits, may be submitted without a sponsoring witness, except for good cause shown.

(b) *Examination of witnesses.* All witnesses shall be required to take an oath or affirmation before testifying. Parties are entitled to conduct direct examination (consisting of the testimony of the witness in the written statements and an oral summary of that testimony); cross-examination (limited to matters raised on direct examination); and redirect examination (limited to matters raised on cross-examination). The Copyright Royalty Judges may limit the number of witnesses or limit questioning to avoid cumulative testimony.

(c) *Exhibits*—(1) *Submission.* Writings, recordings and photographs shall be presented as exhibits and marked by the presenting party. “Writings” and “recordings” consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation. “Photographs” include still photographs, video tapes, and motion pictures.

(2) *Separation of irrelevant portions.* Relevant and material matter embraced in an exhibit containing other matter not material or relevant or not intended as evidence must be plainly designated as the matter offered in evidence, and the immaterial or irrelevant parts shall be marked clearly so as to show they are not intended as evidence.

(3) *Summary exhibits.* The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in the hearing may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The Copyright Royalty

Judges may order that they be produced in the hearing.

(d) *Copies.* Anyone presenting exhibits as evidence must present copies to all other participants in the proceedings, or their attorneys, and afford them an opportunity to examine the exhibits in their entirety and offer into evidence any other portion that may be considered material and relevant.

(e) *Introduction of studies and analyses.* If studies or analyses are offered in evidence, they shall state clearly the study plan, the principles and methods underlying the study, all relevant assumptions, all variables considered in the analysis, the techniques of data collection, the techniques of estimation and testing, and the results of the study’s actual estimates and tests presented in a format commonly accepted within the relevant field of expertise implicated by the study. The facts and judgments upon which conclusions are based shall be stated clearly, together with any alternative courses of action considered. Summarized descriptions of input data, tabulations of input data and the input data themselves shall be retained.

(f) *Objections.* Parties are entitled to raise objections to evidence on any proper ground during the course of the hearing and to raise an objection that an opposing party has not furnished unprivileged underlying documents.

(g) *New exhibits for use in cross-examination.* Exhibits that have not been identified and exchanged in advance may be shown to a witness on cross-examination. However, copies of such exhibits must be distributed to the Copyright Royalty Judges and to the other participants before being shown to the witness at the time of cross-examination, unless the Copyright Royalty Judges direct otherwise. Such exhibits can be used solely to impeach the witness’s direct testimony.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006; 71 FR 59010, Oct. 6, 2006]

#### § 351.11 Rebuttal proceedings.

Written rebuttal statements shall be filed at a time designated by the Copyright Royalty Judges upon conclusion of the hearing of the direct case, in the same form and manner as the written

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direct statement, except that the claim or the requested rate shall not have to be included if it has not changed from the written direct statement. Further proceedings at the rebuttal stage shall follow the schedule ordered by the Copyright Royalty Judges.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53329, Sept. 11, 2006]

### § 351.12 Closing the record.

To close the record of a proceeding, the presiding Judge shall make an announcement that the taking of evidence has concluded.

[71 FR 53330, Sept. 11, 2006]

### § 351.13 Transcript and record.

(a) An official reporter for the recording and transcribing of hearings shall be designated by the Copyright Royalty Judges. Anyone wishing to inspect the transcript of a hearing may do so at the offices of the Copyright Royalty Board.

(b) The transcript of testimony and written statements, except those portions to which an objection has been sustained, and all exhibits, documents and other items admitted in the course of a proceeding shall constitute the official written record. The written record, along with the Copyright Royalty Judges' final determination, shall be available at the Copyright Royalty Board's offices for public inspection and copying.

[71 FR 53330, Sept. 11, 2006]

### § 351.14 Proposed findings of fact and conclusions of law.

(a) Any party to the proceeding may file proposed findings of fact and conclusions, briefs or memoranda of law, or may be directed by the Copyright Royalty Judges to do so. Such filings, and any replies to them, shall take place after the record has been closed.

(b) Failure to file when directed to do so shall be considered a waiver of the right to participate further in the proceeding unless good cause for the failure is shown. A party waives any objection to a provision in the determination unless the provision conflicts with a proposed finding of fact or conclusion of law filed by the party.

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(c) Proposed findings of fact shall be numbered by paragraph and include all basic evidentiary facts developed on the record used to support proposed conclusions, and shall contain appropriate citations to the record for each evidentiary fact. Proposed conclusions shall be stated and numbered by paragraph separately. Failure to comply with this paragraph (c) may result in the offending paragraph being stricken.

[71 FR 53330, Sept. 11, 2006]

### § 351.15 Remand.

In the event of a remand from the United States Court of Appeals for the District of Columbia Circuit of a final determination of the Copyright Royalty Judges, the parties to the proceeding shall within 45 days from the issuance of the mandate from the Court of Appeals file with the Judges written proposals for the conduct and schedule of the resolution of the remand.

[74 FR 38533, Aug. 4, 2009]

## PART 352—DETERMINATIONS

Sec.

352.1 How made.

352.2 Timing.

352.3 Final determinations.

AUTHORITY: 17 U.S.C. 803.

SOURCE: 70 FR 30905, May 31, 2005, unless otherwise noted.

### § 352.1 How made.

Except for decisions authorized by law to be made by a single Copyright Royalty Judge, determinations in a proceeding will be made by a majority of the Copyright Royalty Judges. The opinion or opinions of the majority and any dissenting opinion will be included in the determination. Each determination will be transmitted to the Register of Copyrights to enable review for consistency with the Copyright Act on the day it is issued.

[70 FR 30905, May 31, 2005, as amended at 71 FR 53330, Sept. 11, 2006]

### § 352.2 Timing.

The Copyright Royalty Judges will issue their determination within 11